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No. 84-827

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HONORABLE JOHN WESTHAFER, Decatur County Circuit Court Judge, and KENNETH BASS, Decatur County Prosecutor,

Appellants,

v.

WORRELL NEWSPAPERS OF INDIANA, INC., d/b/a Greensburg Daily News, and KAREN McKINLEY,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION TO AFFIRM

STANLEY C. FICKLE
Counsel of Record For Appellees
EDWARD O. DELANEY
of
BARNES & THORNBURG
1313 Merchants Bank Building
Indianapolis, Indiana 46204
Telephone: 317-638-1313

Pandick Midwest, Inc., Chicago • (312) 454-7600

QUESTIONS PRESENTED

1. Whether IND. CODE § 35-34-1-1(d) (1982) is unconstitutionally overbroad under the First and Fourteenth Amendments of the Constitution of the United States in providing a penal sanction against the press for truthful publication of constitutionally protected speech.

2. Whether IND. CODE § 35-34-1-1(d) (1982) is unconstitutional under the First and Fourteenth Amendments in providing for a prior restraint on truthful publication of constitutionally protected speech.

3. Whether IND. CODE § 35-34-1-1(d) (1982) unconstitutionally denies First and Fourteenth Amendment rights of access to governmental information.

Rule 28.1 Statement

Appellee Worrell Newspapers of Indiana, Inc. is a wholly-owned subsidiary of Worrell Newspapers, Inc. Worrell Newspapers of Indiana, Inc. has no subsidiaries or affiliates.

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Appellants,

v.

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Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION TO AFFIRM

Pursuant to Rule 16 of the Rules of the Supreme Court of the United States, appellees move that the judgment of the Court of Appeals be affirmed because the question decided by that court is controlled by numerous decisions of this Supreme Court. The appeal is therefore so insubstantial as not to warrant further argument.

STATEMENT OF THE CASE

Appellee Worrell Newspapers of Indiana, Inc. publishes the Greensburg Daily News, a daily newspaper in the city of Greensburg in Decatur County, Indiana. Appellee Karen McKinley ("McKinley") is a reporter for the Greensburg Daily News. Appellant Honorable John Westhafer ("Judge Westhafer") is the Judge of the Circuit Court for Decatur County, Indiana, and appellant Kenneth Bass ("Prosecutor Bass") is the Decatur County Prosecuting Attorney.

Worrell Newspapers and McKinley commenced this action pursuant to 42 U.S.C. § 1983, alleging that IND. CODE § 35-34-1-1(d) (1982) is unconstitutional under the First and Fourteenth Amendments. The complaint sought a declaratory judgment that the statute is unconstitutional, and did not seek an award of damages, injunctive relief or attorney's fees against the appellants. The District Court upheld the statute but the Court of Appeals unanimously reversed, holding it unconstitutionally overbroad under the First Amendment in providing a penal sanction against the press for publication of constitutionally protected speech. Jurisdictional Statement at 1, Appendix at A-1—A-16. The case was presented to the courts below on the parties' cross-motions for summary judgment, and the facts are not in dispute.

The statutory provision held unconstitutional by the Court of Appeals became effective on September 1, 1982, some two months before the events involved. Pub. L. No. 298 §§ 3, 10, 1981 IND. ACTS at 2350-51, 2392. It provides that:

> The court, upon motion of the prosecuting attorney, may order that [an] indictment or information be sealed. If a court has sealed an indictment or information, *no person* may disclose the fact that an indictment or information is in existence or pending until the defendant has been arrested or otherwise brought within the custody of the court. . . . A violation of this subsection is punishable as a contempt.

IND. CODE § 35-34-1-1(d) (1982) (emphasis added). By contrast, the former Indiana statute, which § 35-34-1-1(d) was

enacted to replace, had imposed the obligation of secrecy upon and made subject to the contempt sanction only those persons necessarily privy to the fact that criminal charges had been filed:

> No *complainant,* if the charge be by information and no *grand juror,* if the charge be by indictment, and no *prosecuting attorney, clerk, judge, or other officer* shall disclose the fact that an indictment or information charging a defendant with an offense is pending until the defendant has been arrested or otherwise brought within the custody of the court if the court, upon motion of the prosecuting attorney, within its discretion orders that the indictment or information be sealed . . . . A violation of this subsection is punishable as a contempt.

IND. CODE ANN. § 35-3.1-1(e) (Burns 1979) (emphasis added).

On election day, November 2, 1982, the Decatur County Sheriff publicly announced that Ron Martin, a Decatur County Deputy Sheriff and the Republican candidate for election to the office of Decatur County Sheriff, had been suspended from his employment as deputy sheriff. The next day, November 3, 1982, the Greensburg Daily News published on its front page a lengthy article authored by McKinley concerning Deputy Martin's suspension. McKinley's article said that officials would not confirm that Deputy Martin's suspension was related to an arson investigation which had previously resulted in one arrest and "would not say if criminal charges are pending against Martin," but that a deputy prosecutor had said "other arrests may be pending in the case . . . ." The article further stated that the "Daily News has learned . . . that the suspension of Deputy Martin is in some way connected to a fire . . . which reportedly destroyed a semi-truck owned by Martin;" and that "the decision to seek [Martin's] suspension . . . was not made until Indiana State Police investigator George Peck and city police department Capt. Bob Clark made a hurried trip to Kentucky to talk with a former Decatur County resident, a fact confirmed by the prosecutor's office today."

On the same day, the Greensburg Daily News also published a front page article concerning the election results of the Decatur County Sheriff's race. The article stated that Deputy Martin was the Republican candidate, that he had been defeated "by 803 votes or 8.83 percent of the total," and that while Martin's opponent "probably would have been elected . . . anyway," the election day announcement of Martin's suspension as Deputy Sheriff "may have changed a few votes."

On the morning of the following day, November 4, 1982, a confidential source informed McKinley that a criminal information would be filed that morning in connection with the arson investigation that had led to Deputy Martin's suspension. The source informed McKinley that the charges would be filed against Patrick Schoettmer, the "former Decatur County resident" mentioned in her November 3, 1982 article.

The same morning, Prosecutor Bass filed a criminal information against Patrick Schoettmer in connection with the arson investigation that had led to Deputy Martin's suspension. A probable cause hearing on the criminal information was held that morning in open court before Judge Westhafer, during which there was testimony that (1) Schoettmer had been questioned at Fort Knox, Kentucky, by Indiana police officers and had admitted his involvement in the arson; (2) several of Schoettmer's relatives had also been questioned by police officers and had also said he was involved in the arson; and (3) a witness had said Deputy Martin paid him and Schoettmer to commit the arson. Judge Westhafer then ordered that a warrant be issued for Schoettmer's arrest. After the hearing, Prosecutor Bass moved that Judge Westhafer order that the criminal information be sealed pending Schoettmer's arrest, and Judge Westhafer ordered it sealed pursuant to IND. CODE § 35-34-1-1(d).

That same morning, McKinley went to the Decatur County Clerk's office to look at the court records in order to confirm Schoettmer's name and to learn the details of the charges. The employees in the Clerk's office would not allow McKinley to

look in the criminal docket book and denied her access to the records relating to the criminal information and Judge Westhafer's order that the information be sealed. McKinley then went to see Judge Westhafer and asked him why she was being denied access to the records relating to the information filed against Schoettmer. Judge Westhafer told McKinley that he had ordered it sealed until Schoettmer was taken into custody.

McKinley asked Judge Westhafer what would happen if the Greensburg Daily News published a story concerning the charges filed against Schoettmer. Judge Westhafer told McKinley that she and her editor would be held in contempt if the newspaper published the story. Prosecutor Bass was also present during part of McKinley's conversation with Judge Westhafer. Judge Westhafer and Prosecutor Bass showed McKinley a copy of IND. CODE § 35-34-1-1(d) (1982), and told McKinley that if any person disclosed the fact that a sealed information existed, that person would be subject to a contempt hearing.

McKinley then returned to the Greensburg Daily News and told her editor, John Murphy, of her meeting with Judge Westhafer. Because Murphy and McKinley feared being held in contempt if any article concerning the Schoettmer information or its sealing were published, no article was published on November 4, 1982. But for Judge Westhafer's statements to McKinley and the provisions of IND. CODE § 35-34-1-1(d), such an article would have been published in the Greensburg Daily News on that day.

Later that day, editor Murphy went to see Judge Westhafer. Judge Westhafer told Murphy that if the newspaper published any information that criminal charges had been filed and sealed before Schoettmer was arrested, "it would be going against [his seal] order and the statute would apply." Judge Westhafer told Murphy it made no difference that the newspaper had learned of the charges against Schoettmer independently rather than from the court records, and reiterated that if a story were published, "the statute would apply."

ARGUMENT

I. The Court of Appeals Decision Is Clearly Mandated By This Court's Decisions Proscribing Penal Sanctions Against The Press For Truthful Publication of Constitutionally Protected Speech.

IND. CODE § 35-34-1-1(d) forbids truthful publication by the press. It provides that if a criminal indictment or information is ordered sealed, "no person" may disclose the fact that it is in existence until the defendant is arrested, and that any violation of that statutory prohibition "is punishable as a contempt." The obligation of secrecy and contempt sanction are not limited to governmental officials or other persons necessarily privy to the fact that criminal charges have been filed, but rather forbid speech and publication by any person who learns of the fact by any means.

The statute applies to members of the general public and the press whether they learn of the indictment or information before or after it is filed and ordered sealed. It applies to them whether they learn of the charges through a disclosure by a governmental official, a complainant or grand juror, through attendance at open court proceedings, through interviews with persons contacted by police officials attempting to arrest the defendant, or by any other means. The only exception is for "any disclosure necessarily incident to the arrest of the defendant." IND. CODE § 35-34-1-1(d) (1982).

In this case, the press learned of the Schoettmer information before it was filed and by means independent of the court records. Through McKinley's meeting with Judge Westhafer and Prosecutor Bass, appellees' knowledge of the information was confirmed and they further learned that Judge Westhafer had ordered it sealed. Nevertheless, the statute's prohibition on disclosure forbade publication of the facts that an information had been filed against Patrick Schoettmer, that criminal charges had been filed in connection with the arson investigation that had led to Deputy Martin's suspension, or even that a criminal information had been ordered sealed.

In forbidding truthful publication by the press and providing for punishment by contempt if that command is violated, § 35-34-1-1(d) patently violates the First Amendment under this Court's decisions. In *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979), the defendant newspaper challenged the constitutionality of a state statute making it a misdemeanor to publish the name of a juvenile offender without court approval. The newspaper argued that the statute was an unconstitutional prior restraint, but this Court found it unnecessary to reach that issue. *Id.* at 100-01. Rather, because the statute provided punishment for the truthful publication of lawfully obtained information, the Court applied essentially the same First Amendment standards that apply to prior restraints. *Id.* at 101-105. It held that the State's interest in "protect[ing] the anonymity of the juvenile offender [to] . . . further his rehabilitation" was "not sufficient to justify application of a criminal penalty to [the newspaper's truthful publication]." *Id.* at 104.

Likewise, in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), this Court held violative of the First Amendment a state statute making it a misdemeanor for the press to publish information regarding confidential proceedings before a judicial disciplinary commission. The Court held that the State's interests in promoting and facilitating the effectiveness of the disciplinary commission, including encouraging the filing of complaints and willing participation of witness, *id.* at 835-36, and avoiding unjustified injury to judicial reputations, *id.* at 840-842, were "insufficient to justify the actual and potential encroachments on freedom of speech and of the press which follow [from punishing publication of truthful information]." *Id.* at 838.

These decisions clearly mandate the result reached by the Court of Appeals. In a case presenting the identical state interests involved here, for example, the Florida Supreme Court invalidated a statute making it a crime to publish the name of a person subject to a wiretap order until an indictment or

information was brought. *Gardner v. Bradenton Herald, Inc.*, 413 So.2d 10 (Fla.), *cert. denied*, 459 U.S. 865 (1982). On the authority of *Daily Mail* and *Landmark Communications*, the court held the statute an unconstitutional restraint on the publication of truthful information. 413 So.2d at 11-12.

Under *Landmark Communications* and *Daily Mail Publishing*, § 35-34-1-1(d) reaches too broadly in punishing truthful publication by the press, as the Court of Appeals held. This Court's First Amendment overbreadth analysis requires that statutes infringing upon First Amendment rights be narrowly tailored, *e.g., Shelton v. Tucker*, 364 U.S. 479, 488-89 (1960), and it is apparent that less drastic and more narrowly tailored means are available to serve the State's purposes. For example, the predecessor statute limited the obligation not to disclose the existence of a sealed indictment or information to those persons necessarily privy to knowledge of it, without restraining or punishing speech or publication by the press or members of the general public. IND. CODE ANN. § 35-3.1-1(e) (Burns 1979). In addition, the State could adopt more careful internal procedures to protect confidential information. *See, e.g., Landmark Communications*, 435 U.S. at 845.

Appellants contended below that such less drastic means may not achieve the State's objectives in circumstances where the information is nevertheless obtained by the press. Under this Court's precedents, however, "because a statute is overbroad [in applying to protected speech] . . . government *must* make use of less drastic means if it would regulate at all—*whatever* substantive reduction in efficacy a less drastic means might entail." L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-30 at 722 (1978) (emphasis in original).

Landmark Communications held that the State was *required* to limit punishment for disclosure of confidential information to participants in the disciplinary proceedings. *See* 435 U.S. at 841 & n.12. Although such means would not serve the government's interests *as perfectly* as the broader rule where, as there, the press does obtain the information, this Court held the

State's statute invalid because "*much* of the risk" could be avoided "through careful internal procedures . . . ." *Id.* at 845 (emphasis added). Similarly, *Daily Mail Publishing* held that the government was limited to use of other means, such as voluntary cooperation between the press and court, to serve its interests, 443 U.S. at 105 & n.3, even though such means would not work *as perfectly* as the broader rule punishing a newspaper for truthful publication.

The fact that neither the Federal Government nor most other States have found it necessary to punish the press for publication of such information demonstrates that such less drastic means are feasible. *Cf., Landmark Communications,* 435 U.S. at 841 & n.12 ("more than 40 States" had not found it necessary to punish publication by the press); *Daily Mail Publishing,* 443 U.S. at 105 & n.2 ("only 5 [States] . . . impose criminal penalties on nonparties for publication"). As the Court of Appeals observed, Fed. R. Crim. P. 6(e)(2),(4) provides for the sealing of indictments but limits the obligation of secrecy and the class of persons subject to punishment by contempt to "[a] grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or [other governmental personnel] to whom disclosure is made under [this Rule]." Similarly, States with rules or statutes modeled on Fed. R. Crim. P. 6 limit the secrecy obligation to persons who are privy to the information due to their relationship with the grand jury. *See, e.g.,* Del. Sup. Ct. Cr. R. 6(e); ILL. ANN. STAT. ch. 38, § 112-6; KAN. STAT. ANN. § 22-3012; Me. R. Cr. P. 6(e); MONT. CODE ANN. § 95-1409; N.C. GEN. STAT. § 15A-623(g); R. I. Sup. Ct. Crim. R. 6(e); S.D. CODIFIED LAWS ANN. § 23A-5-16 (Rule 6(e)); Vt. R. Cr. P. 6(f); W. Va. R. Cr. P. 6(e)(4).[1]

[1] Of the other state statutes and rules claimed by appellants to be comparable to IND CODE § 35-34-1-1(d), *see* Jurisdictional Statement Appendix at A-21—A-29, some plainly do not punish disclosures by

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The Court of Appeals decision holding IND. CODE § 35-34-1-1(d) invalid on this basis is also correct because there is no principle that could limit a contrary conclusion to the case of sealed criminal charges alone. As appellants argued to that court and as is obviously true, the State's interests in avoiding a criminal suspect's possible flight or possible destruction of evidence may be impaired by press publication concerning a grand jury's investigation no less than by publication of the formal decision to bring charges. Accordingly, if punishment of the press for publishing the fact of criminal charges were permissible under the First Amendment, then the press could also be punished for publishing grand jury leaks because the *identical* state interests are involved and "less drastic means" to serve those interests are no more available in that case than in this one.

Nor could that result be limited to the grand jury investigation and the formal decision to file charges. The same state interests in avoiding flight and the destruction of evidence are equally implicated by publication of the fact that the police are investigating a particular lead, or, in a given case, that they have discovered and are pursuing one of an unnamed character, or even that a crime has been discovered. Since the *identical* state interests are or may be involved in each of these situations and the government's other means to serve those

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the press and others are ambiguous. The contempt sanction of ILL. ANN. STAT. ch. 38, § 112-6(b) is clearly limited to "[a]ny grand juror or officer of the court," as is further confirmed by the Committee Comments on the rule. The contempt sanction of N.C. GEN. STAT. § 15A-623(g) is similarly limited. OHIO REV. CODE ANN. § 2939.18 reads as broadly as Indiana's statute but the category of persons subject to sanction is probably limited by Ohio R. Cr. P. 6(E). The scope of Ky. R. Cr. P. 5.24(2)-(3) may be limited by the terms of subsection (1). Of the statutes and rules cited by appellants, only ARIZ. REV. STAT. ANN. § 13-2813, FLA. STAT. § 905.27, and OR. REV. STAT. §§ 132.420, 132.990 clearly appear to sweep as broadly as IND. CODE § 35-34-1-1(d) and punish publication by the press.

interests are no more effective in those circumstances than here, any constitutional authority to punish such publication would extend to each of them as well as many others.

At bottom, of course, innumerable legitimate and indeed worthy governmental interests, ranging from the conduct of foreign policy to the rehabilitation of juvenile offenders, could be more perfectly achieved were the government permitted to control the dissemination of information by the press. For reasons going to the very structure of the government created by our Constitution, however, this Court has determined that the State is constitutionally required to use other means even though they may work only imperfectly in a given case. *Smith v. Daily Mail Publishing Co.*, 443 U.S. at 105 & n.2; *Landmark Communications, Inc. v. Virginia*, 435 U.S. at 841 & n.12, 845.

II. The Court of Appeals Decision Is Also Clearly Mandated By This Court's Decisions Proscribing Prior Restraints On Publication Of Constitutionality Protected Speech.

In commanding that "no person" shall disclose that sealed criminal charges are pending and providing for punishment by contempt if that command is violated, IND. CODE § 35-34-1-1(d) provides for a prior restraint upon publication whenever, as here, the press already has or later learns of that information. The statute does present a variation on the "classic mold of prior restraint" under First Amendment law, which typically involves a "prior injunction against publication." *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 101 (1979). However, the threat of punishment by contempt is the sanction for violation of the typical injunction, and punishment by contempt is precisely what § 35-34-1-1(d) provides.

In imposing a prior restraint on publication by the press, § 35-34-1-1(d) wars with the most central principle embodied in the First Amendment. "[T]he main purpose of [the First Amendment] is 'to prevent all such *previous restraints* upon publications as had been practiced by other governments.'" *Patterson v. Colorado ex rel. Attorney General*, 205 U.S. 454,

462 (1907) (emphasis in original). "[I]t has been generally, if not universally, considered that it is the chief purpose of the [First Amendment's] guaranty to prevent previous restraints upon publication." *Near v. Minnesota ex rel. Olson,* 283 U.S. 697, 713 (1931).

As the Court of Appeals noted, the seminal decision in *Near* identified only three exceptions to the First Amendment's prohibition of prior restraints on publication by the press. 283 U.S. at 716. Two of those exceptions have since been explained as involving "speech" that is not protected within the meaning of the First Amendment—obscenity and direct incitements to immediate violence. *See Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 590 (1976) (Brennan, J., concurring in judgment). "[O]nly the third category in *Near* contemplated the possibility that speech meriting and entitled to constitutional protection might nevertheless be suppressed before publication in the interest of some overriding countervailing interest"—speech endangering the Nation's "military security." *Id.* at 591.

The publication that § 35-34-1-1(d) restrains is clearly protected by the First Amendment. That speech and publication concerns the criminal justice system and the filing of criminal charges, and

> *the protection against prior restraint should have particular force as applied to reporting of criminal proceedings, whether the crime in question is a single isolated act or a pattern of criminal conduct.* " A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism."

Nebraska Press Ass'n v. Stuart, 427 U.S. at 559-60 (citation omitted, emphasis added).

Thus, this Court in *Nebraska Press* held invalid a prior restraint on pretrial publicity, notwithstanding the argument that the restraint served the State's interest in protecting the defendant's Sixth Amendment right to a fair trial. 427 U.S. at 569-570. Plainly, the state interest here in possibly rendering easier the arrest of a criminal suspect is *by definition* of no greater weight than the interest in protecting a defendant's *constitutional* right to a fair trial. Moreover, although *Nebraska Press Ass'n,* 427 U.S. at 569-70, held invalid on the facts of that case the prior restraint on publication of information independently acquired by the press, Justice Brennan wrote that such a prior restraint could never be validly entered, *id.* at 611-13, Justices Stewart and Marshall joined that opinion, *id.* at 572, and two other Justices indicated general agreement with it. *Id.* at 570-71 (White, J., concurring); *id.* at 617 (Stevens, J., concurring in judgment).

Further, the Court unanimously held, as a *per se* rule, that information the government had previously disseminated could not be restrained from publication. *Id.* at 567-68. Subsequently, in *Oklahoma Publishing Co. v. District Court,* 430 U.S. 308 (1977), the Court again enforced that *per se* rule. Where the government had disclosed the identity of a juvenile offender, it could not, as a matter of law and without regard to any other consideration, restrain the press from publishing it. *Id.* at 310-12.

Thereafter, *Smith v. Daily Mail Publishing Co.,* 443 U.S. 97 (1979), held that the First Amendment principles of *Oklahoma Publishing* could not be a limited to "situations where the government itself provided or made possible press access to the information." 443 U.S. at 103. In holding that the press could not constitutionally be punished for publication of independently acquired information, the Court reasoned that "[a] free press cannot be made to rely solely upon the sufferance of government to supply it with information." *Id.* at 104.

These decisions necessarily establish that outside the narrow area of national security, truthful publication of constitutionally protected, lawfully obtained information may not be restrained or punished by the government, as a *per se* rule.

Moreover, even in the case of military security—the *only* recognized exception to the First Amendment's ban on prior restraints of protected speech—the government bears a "heavy burden of showing justification for the prior restraint," which is still "presumptively unconstitutional." *Nebraska Press Ass'n,* 427 U.S. at 558. When that burden was not met in *New York Times Co. v. United States,* 403 U.S. 713 (1971), this Court refused to uphold a prior restraint on publication of the Pentagon Papers, "despite the fact that a majority of the Court believed that release of the documents, which were classified 'Top Secret-Sensitive' . . . would be harmful to the Nation . . . ." *Nebraska Press Ass'n,* 427 U.S. at 591-92 (Brennan, J., concurring in judgment).

Even were the State's interest in facilitating the arrest of a defendant sufficient to justify a prior restraint on publication—a legal proposition which appellees deny and which no authority supports—the statute in this case does not meet the standards applicable even to speech and publication endangering the Nation's military security. First, as is both apparent on the face of the statute and demonstrated by the facts of this case, IND. CODE § 35-34-1-1(d) contains no *substantive* limits to restrict prior restraints thereunder to circumstances where a compelling state interest is present. *See* pp. 16-17, *infra.* Second, as is also both apparent on the face of the statute and demonstrated by the facts of this case, § 35-34-1-1(d) provides no *procedural* protections to ensure that restraining publication is in fact required to accomplish the State's interest in the circumstances of the particular case. *See* pp. 21-22, *infra.* This Court has held that a hearing and articulated findings on the record are required even in "right of access" cases, which involve only a

presumptive First Amendment right that may be overridden by a substantial state interest actually served in the particular case. *Press-Enterprise Co. v. Superior Court,* ____ U.S. ____, 78 L.Ed.2d 629, 638-40 (1984); *Globe Newspapers Co. v. Superior Court,* 457 U.S. 596, 608-09 & nn.20, 25 (1982). *See* Part III, *infra. A fortiori,* such procedures would be mandated in the case of any otherwise permissible prior restraint, the most constitutionally suspect area of First Amendment law.[2]

The appellants contend that IND. CODE § 35-34-1-1(d)'s authorization of a prior restraint on truthful publication of constitutionally protected speech could be upheld under a "clear and present danger" test. However, this Court has restricted use of that analysis to carving out extremely narrow categories of constitutionally "unprotected" speech such as direct incitements to immediate violence. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 12-2 at 582, 12-9—12-11. Use of that test may indeed be limited to the context of immediate violence, *see Nebraska Press Ass'n,* 427 U.S. at 590 (Brennan, J., concurring in judgment); J. ELY, DEMOCRACY AND DISTRUST 110 (1980), and it is rarely if ever satisfied even in that context. *See, e.g., Hess v. Indiana,* 414 U.S. 105 (1973); *Brandenburg v. Ohio,* 395 U.S. 444 (1969). In any event, under this Court's decisions, § 35-34-1-1(d) cannot be justified as preventing a "clear and present danger."

First, *Landmark Communications* held that the "clear and present danger" test is not and cannot be met by a pre-defined legislative category—in that case, all confidential information

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[2] To the extent that this statute departs from the classic, injunctive form of prior restraint, its effects are even more insidious. Unlike the case of the ordinary prior injunction, a party who may ultimately be charged with contempt under the statute is never afforded an opportunity to be heard before entry of the seal order. For that procedural reason alone, IND. CODE § 35-34-1-1(d) should be held unconstitutional. *See Carroll v. President and Commissioners of Princess Anne,* 393 U.S. 175, 181-84 (1968).

before a disciplinary commission. 435 U.S. at 843-44. That is precisely what the State here attempts to do under § 35-34-1-1(d) as to all criminal charges a court orders sealed. Appellants' "clear and present danger" contention erroneously equates that strict constitutional standard for defining *unprotected speech* with the far more permissive standards under which criminal charges may be sealed. In providing a prior restraint on publication in all cases where a court orders charges sealed, the statute is patently overbroad.

The "clear and present danger" standard is the most stringent known to constitutional law:

> [T]o warrant a sanction "[t]he fires which [the expression] kindles must constitute *an imminent, not merely a likely,* threat to the administration of justice. The danger must not be remote *or even probable;* it must *immediately imperil.*"

Wood v. Georgia, 370 U.S. 375, 385 (1962) (quoting *Craig v. Harney,* 331 U.S. 367, 376 (1947)) (emphasis added). *Accord, Landmark Communications,* 435 U.S. at 844-85. Assuming *arguendo* that this standard could ever be met in the case of press publication, § 35-34-1-1(d) obviously does not limit the court's authority to seal to such circumstances. Nor does it provide procedures to ensure that "an imminent, not merely a likely" danger is in fact involved and cannot otherwise be prevented in the circumstances of the particular case. This can be no better illustrated than by the facts of the case at bar.

The very day before it was restrained from publishing a story concerning the charges against Schoettmer, the Greensburg Daily News had published on its front page McKinley's article which reported that Deputy Martin had been suspended in connection with an arson involving Martin's truck and that a deputy prosecutor had said "other arrests may be pending in the case . . . ." Schoettmer and several of his relatives had been questioned by the police and had admitted Schoettmer's in-

volvement in the arson. Schoettmer was known by the police to be at Fort Knox, Kentucky. Appellants contended that the seal order was proper because Schoettmer's relatives *might* have learned of the charges, they *might then* have telephoned and told him, he *might then* have decided to flee in response to such a call, and he *might then* have been able to flee before the police arrived.

Given the previous day's front page publication that a prosecutor had said "other arrests may be pending" and Schoettmer's and his relatives' previous admissions of his involvement, the incremental probability that flight would be caused by newspaper publication of the fact that formal charges had been filed was no greater than the probability that *any* defendant might flee if so informed. Moreover, given that Schoettmer's location was known to the state authorities, the State's interest in restraining press publication may have been no greater than it would be in the case of any defendant. There was no explanation why the State's interest could not have been equally well served merely by a telephone call to the local police authorities. Under these standards, any and all criminal charges may be ordered sealed pursuant to IND. CODE § 35-34-1-1(d) and press publication may always be restrained and punished thereunder. These standards for sealing do not by definition satisfy the stringent requirements of the "clear and present danger" test for defining constitutionally unprotected speech.

Second, the analysis in *Landmark Communications* necessarily shows that the "clear and present danger" standard cannot be met in the case of publication by the press of the fact that criminal charges have been filed. After rejecting the argument that the legislature's pre-defined category could be found to present a "clear and present danger" in *Landmark Communications,* the Court *did not* say that the punishment for publication could nevertheless be upheld *if the facts of the particular case showed a "clear and present danger."* Rather, the Court reasoned by *category* and held the "clear and present

danger" test inapplicable altogether to justify punishment of publication of truthful information:

> The threat to the administration of justice posed by the speech and publications in *Bridges, Pennekamp, Craig,* and *Wood,* was, if anything, more direct and substantial than the threat posed by Landmark's article. If the clear-and-present danger test could not be satisfied in the more extreme circumstances of those cases, it would seem to follow that the test cannot be met here. *It is true that some risk of injury to the judge under inquiry, to the system of justice, or to the operation of the Judicial Inquiry and Review Commission may be posed by premature disclosure, but the test requires that the danger be "clear and present" and in our view the risk here falls far short of that requirement. Moreover, much of the risk can be eliminated through careful internal procedures to protect the confidentiality of Commission proceedings. Cf. Nebraska Press Assn. v. Stuart,* 427 U.S., at 564; *id.,* at 601 n.27 (Brennan, J. concurring in judgment). *In any event,* we must conclude as we did in *Wood v. Georgia,* that *"the type of 'danger' evidenced by the record is precisely one of the types of activity envisioned by the Founders in presenting the First Amendment for ratification."* 370 U.S., at 388.

435 U.S. at 845 (emphasis added; footnote omitted).

The same considerations clearly dictate the Court of Appeals decision that § 35-34-1-1(d) is unconstitutional. The publication restrained and punished—which involves the criminal justice system and, in this case, election day allegations of misconduct by a public official and candidate for office—lies at the very "core of the First Amendment." *Landmark Communications,* 435 U.S. at 838. While "some risk of injury" to the State's interest is posed by publication, "much of the risk" can be avoided by other means. *Id.* at 845. The "type of 'danger' " that remains is " 'precisely one of the types of activity envisioned by the Founders in presenting the First Amendment for ratification.' " *Id.*

Moreover, the possibility that the State will *otherwise* be unable to prevent a criminal suspect from successfully avoiding

arrest or destroying evidence if a newspaper publishes the fact that he has been charged can never be shown to be "imminent, not merely likely." *Wood v. Georgia*, 370 U.S. at 385. That risk can never be judged as "immediately imperil[ing]" rather than merely "probable." *Landmark Communications*, 435 U.S. at 845. Appellants cite *no* case upholding a prior restraint upon truthful newspaper publication on the basis of a "clear and present danger" analysis, and this Court's decisions show that apart from the area of national security, that standard can never be met in the case of press publication, as a matter of law.

III. IND. CODE 35-34-1-1(d) Also Unconstitutionally Denies The Right Of Access To Information Under the First And Fourteenth Amendments.

IND. CODE § 35-34-1-1(d) is also unconstitutional in denying the press and public their presumptive right of access to governmental information without substantive and procedural standards to assure that denial is necessary in the individual case. In this case, appellees were not only restrained and threatened with punishment for publication of the facts they knew but also were denied access to all records pertaining to the charges filed against Schoettmer, including the transcript of the public probable cause hearing which related details of the arson and evidence of Deputy Martin's involvement. Although the Court of Appeals found it unnecessary to reach the issue in view of the other grounds for its decision, appellees presented and argued the right of access issue in the courts below and the judgment should be affirmed if there are any grounds to support it. *E.g., California Bankers Ass'n v. Schultz*, 416 U.S. 21, 71 (1974).

This Court's recent decisions firmly establish that the First Amendment guarantees the press and public rights of access to information concerning the criminal justice system and proceedings therein. *Press-Enterprise Co. v. Superior Court*, ____ U.S. ____, 78 L.Ed.2d 629 (1984); *Globe Newspaper Co. v.*

Superior Court, 457 U.S. 596 (1982). The First Amendment underpinning of the right of access is "the common understanding that 'a major purpose of that Amendment was to protect the free discussion of governmental affairs'" and the structural role in "contribut[ing] to our republican system of self-government" that access to governmental information plays. *Globe Newspaper Co.*, 457 U.S. at 603-606 and authorities cited. Applying this reasoning, lower courts have held that the right of access applies at various stages of the criminal justice system. *E.g., Associated Press v. United States District Court*, 705 F.2d 1143 (9th Cir. 1983) (court's pre-trial records and files); *U.S. v. Chagra*, 701 F.2d 354 (5th Cir. 1983) (bail reduction hearings); *In re Express-News Corp.*, 695 F.2d 807 (5th Cir. 1982) (restrictions on post-trial interviews of jurors); *U.S. v. Criden*, 675 F.2d 550 (3d Cir. 1982) (pre-trial hearings on motions to suppress and dismiss); *cf. Newman v. Graddick*, 696 F.2d 796 (11th Cir. 1983) (hearing on prisoner release pursuant to consent decree in civil action).

The analysis in these cases dictates that the presumptive right of access attaches at the point criminal indictments and informations are filed. As this Court has said in another context, the filing of criminal charges "is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice." *Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion). Furthermore, each of the First Amendment values identified by this Court as supporting the right of access "appl[ies] with equal force" at that point. *U.S. v. Criden*, 675 F.2d at 556-57.

For example, perhaps the most important function of public scrutiny is providing a check on abuse of judicial and prosecutorial power. *See Nebraska Press Ass'n*, 427 U.S. at 559-60; *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 591-92, 595-96 (1980) (Brennan, J., concurring in judgment); *id.* at 604 (Blackmun, J., concurring in judgment). The benefits of that scrutiny are manifest at the point criminal

charges are filed. Sealing an indictment brought by a grand jury could be used to protect a personal friend or political ally of the court or prosecutor. Conversely, by securing and sealing criminal information, a prosecutor could obtain a powerful weapon with which to coerce an enemy. The public interest in avoiding such abuses is particularly apparent where, as here, charges are filed involving allegations during an election of misconduct by a public official, and the very possibility of such abuses militates in favor of public knowledge that criminal charges have been filed. *Cf. Nebraska Press Ass'n,* 427 U.S. at 606 (Brennan, J., concurring in judgment).

First Amendment rights of access are not absolute and may be limited in service to a substantial governmental objective. However, "[w]here . . . the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Globe Newspaper Co.,* 457 U.S. at 606-07. Moreover, the State's interest cannot be merely a generalized interest in secrecy, but must be present in the circumstances of the particular case. *See id.* at 607-08 ("as compelling as that [state] interest is, it does not justify a *mandatory* closure rule, for it is clear that the circumstances of the particular case may affect the significance of the interest") (emphasis in original).

In individual cases, legitimate governmental interests such as avoiding the flight of a defendant may override the right of access to information that charges have been filed pending the defendant's arrest. The constitutional defect of IND. CODE § 35-34-1-1(d) in this respect, however, is that it permits sealing absent a need for secrecy in the circumstances of the particular case. It provides neither standards that limit sealing to those cases in which it is justified, nor procedures necessary to ensure that such standards are met.

The right of access requires, first, that the government show that justification for secrecy exists in the particular case.

Globe Newspaper Co., 457 U.S. at 606-07. Thus, the prosecutor must make a showing that if the indictment or information is not sealed, the harm sought to be prevented—*e.g.*, flight of the defendant—will be likely to occur. IND. CODE § 35-34-1-1(d) does not limit the authority to seal to such circumstances and does not require such a showing. It allows sealing even where the defendant already knows or suspects the charges will be brought, where flight has already occurred, or where the nature of the charge or the defendant's personal circumstances make flight highly unlikely. This is forcefully demonstrated by the facts of this case. *See* pp. 16-17, *supra.*

Second, § 35-34-1-1(d) does not require that a court consider whether less restrictive alternatives are available in the circumstances to serve the government's interest without denying entirely the right of access. *See Press-Enterprise Co.*, ____ U.S. at ____, 78 L.Ed.2d at 639. In a given case, for example, disclosure that criminal charges are pending in connection with a certain crime or criminal investigation may not create a substantial risk of flight so long as the defendant's identity is not disclosed. In this case, of course, the Greensburg Daily News had *already* published a front-page article stating that a deputy prosecutor had said other arrests may be pending in the case.

Finally, § 35-34-1-1(d) is patently deficient in not requiring that the reasons supporting a decision to seal "*be articulated in findings*" by the court, *Globe Newspaper Co.*, 457 U.S. at 608 n.20 (emphasis in original); *accord Press-Enterprise Co.*, ____ U.S. at ____, 78 L.Ed.2d at 640, thus preserving both rights of review and the availability of later public scrutiny of the decision. This case fully illustrates the reason for this Court's requirements of a hearing and articulated findings on the record, as the transcript of the probable cause hearing here reveals no facts or reasoning supporting the decision to seal.

CONCLUSION

The Court of Appeals decision that § 35-34-1-1(d) is unconstitutionally overbroad in providing a penal sanction for truthful publication by the press is clearly mandated by this Court's decisions. That decision is also mandated by this Court's decisions proscribing prior restraints on publication of constitutionally protected speech. Finally, the Court of Appeals' judgment of unconstitutionality is also supported by this Court's right of access decisions. For these reasons, the judgment below should be affirmed.

Respectfully submitted,

STANLEY C. FICKLE
Counsel of Record For Appellees
EDWARD O. DELANEY

of

BARNES & THORNBURG
1313 Merchants Bank Building
Indianapolis, Indiana 46204
Telephone: 317-638-1313